

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

Marc E. Kasowitz (mkasowitz@kasowitz.com)

Mark W. Lerner (mlerner@kasowitz.com)

Blythe E. Lovinger (blovinger@kasowitz.com)

Garrett D. Kennedy (gkenedy@kasowitz.com)

1633 Broadway

New York, New York 10019

Tel.: (212) 506-1700

Attorneys for Defendants NYP Holdings, Inc.,  
d/b/a the New York Post, Michelle Gotthelf and  
Daniel Greenfield

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AUSTIN FENNER and  
IKIMULISA LIVINGSTON,

Plaintiffs,

vs.

NEWS CORPORATION, NYP HOLDINGS,  
INC., d/b/a THE NEW YORK POST,  
MICHELLE GOTTHELF and, DANIEL  
GREENFIELD, in their official and individual  
capacities,

Defendants.  
-----X

Civ. No.: 09 CV 9832 (LGS)

**DECLARATION OF MARK W. LERNER, ESQ.**

MARK W. LERNER, ESQ., hereby declares as follows:

1. I am a partner with the firm of Kasowitz, Benson, Torres & Friedman LLP, counsel for Defendant NYP Holdings, Inc., d/b/a the New York Post (the “Post”), and Col Allan (together, “Defendants”). I have personal knowledge of the facts set forth herein, except where otherwise indicated. I submit this Declaration in support of Defendants’ Motion for Summary Judgment in the above-captioned action.

2. Pursuant to Rule III.B.3 of the Individual Rules of Practices of United States District Judge Lorna G. Schofield, Exhibits have been excerpted to include only relevant material.

3. Attached hereto as Exhibit 1 are true and correct copies of referenced pages from the transcript of the deposition of Daniel Greenfield (“Greenfield”), taken April 5, 2012.

4. Attached hereto as Exhibit 2 are true and correct copies of referenced pages from the transcript of the deposition of Michelle Gotthelf (“Gotthelf”), taken March 29, 2012.

5. Attached hereto as Exhibit 3 are true and correct copies of referenced pages from the transcript of the deposition of Austin Fenner (“Fenner”), taken January 11, 2012.

6. Attached hereto as Exhibit 4 are true and correct copies of the annual performance appraisal (“APA”) Fenner received for fiscal year (“FY”) 2008, dated July 28, 2008, previously produced with the Bates Nos. NYP-FL00477 through NYP-FL00480, and a performance warning received by Fenner from Gotthelf, dated July 28, 2008, previously produced with the Bates No. NYP-FL000501.

7. Attached hereto as Exhibit 5 is a true and correct copy of an e-mail from Michelle Gotthelf to Amy Scialdone, dated July 25, 2008, previously produced with the Bates No. NYP-FL000523.

8. Attached hereto as Exhibit 6 is a true and correct copy of the annual self-appraisal prepared by Fenner for fiscal year FY 2009, previously produced by Fenner with the Bates Nos. AF\_82 through AF\_83.

9. Attached hereto as Exhibit 7 are true and correct copies of the APA Fenner received for FY 2009, dated September 17, 2009, previously produced with the Bates Nos. NYP-

FL000472 through NYP-FL000475, and a performance warning received by Fenner from Gotthelf, dated September 16, 2009, previously produced with the Bates Nos. NYP-FL000500.

10. Attached hereto as Exhibit 8 are true and correct copies of an e-mail chain between Fenner and Greenfield, copying Gotthelf, dated June 9 and 10, 2009, previously produced with the Bates No. NYP-FL000261, and an e-mail from Greenfield to Fenner, copying Gotthelf, dated August 11, 2009, previously produced with the Bates No. NYP- NYP-FL000560.

11. Attached hereto as Exhibit 9 is a true and correct copy of an e-mail chain between Gotthelf, Scialdone, and Greenfield, dated November 4, 2009, previously produced with the Bates No. NYP-FL000518.

12. Attached hereto as Exhibit 10 are true and correct copies of (i) an e-mail chain between Livingston and Angelo, dated March 3, 2005, previously produced with the Bates No. IL\_590; (ii) an e-mail chain between Ikimulisa Livingston (“Livingston”), Gotthelf, and Jesse Angelo (“Angelo”), dated January 27, 2006, previously produced with the Bates Nos. NYP-FL001933 through NYP-FL001937; (iii) an e-mail from Livingston to Angelo and Gotthelf, dated January 30, 2006, previously produced with the Bates No. IL\_597; and (iv) an e-mail from Gotthelf to Angelo, dated February 16, 2006, previously produced with the Bates No. NYP-FL001947.

13. Attached hereto as Exhibit 11 is a true and correct copy of an e-mail chain between Gotthelf and Livingston, dated March 6, 2006, previously produced with the Bates No. NYP-FL001971.

14. Attached hereto as Exhibit 12 is a true and correct copy of an e-mail chain between Gotthelf and Livingston, dated May 22, 2008, previously produced with the Bates No. IL\_115.

15. Attached hereto as Exhibit 13 is a true and correct copy of the APA that Livingston received for FY 2008, dated July 9, 2008, previously produced with the Bates Nos. NYP-FL000328 through NYP-FL000331.

16. Attached hereto as Exhibit 14 are true and correct copies of referenced pages from the transcript of the deposition of Jesse Angelo, taken April 25, 2012 and April 5, 2013.

17. Attached hereto as Exhibit 15 is a true and correct copy of William Gorta's application for employment with the New York Post, dated August 22, 2000, previously produced with the Bates Nos. NYP-FL000936 through NYP-FL000937.

18. Attached hereto as Exhibit 16 is a true and correct copy of the APA that Livingston received for FY 2009, dated August 13, 2009, previously produced with the Bates Nos. NYP-FL000332 through NYP-FL000334, and a performance warning received by Livingston from Gotthelf, dated August 6, 2009, previously produced with the Bates No. NYP-FL000375.

19. Attached hereto as Exhibit 17 is a true and correct copy of correspondence from Angelo to Livingston, dated February 26, 2013, and an e-mail to Amy Scialdone attaching this correspondence, previously produced with the Bates No. NYP-FL0004874-75.

20. Attached hereto as Exhibit 18 are true and correct copies of referenced pages from the transcript of the deposition of Col Allan, taken February 14, 2012, and February 21, 2013.

21. Attached hereto as Exhibit 19 is a true and correct copy of minutes from the meeting of the Post's Executive Committee, dated March 2, 2009, previously produced with the Bates Nos. NYP-FL003842 through NYP-FL003844.

22. Attached hereto as Exhibit 20 are true and correct copies of referenced pages from the transcript of the deposition of Livingston, taken January 13, 2012, February 20, 2013, and May 6, 2013.

23. Attached hereto as Exhibit 21 are true and correct copies of (i) an e-mail chain between Livingston and Amy Scialdone, dated December 6 and 7, 2009, previously produced by Plaintiffs with the Bates Nos. IL\_274 through IL\_75; and (ii) notes of the Post's internal investigation relating to Livingston, previously produced with the Bates Nos. NYP-FL819 through NYP-FL821.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 10, 2013.

/s/ Mark W. Lerner  
Mark W. Lerner